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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAIME FARFAN GARCIA, Defendant and Appellant.	2d Crim. No. B198095 (Super. Ct. No. 1178036) (Santa Barbara County)

Jaime Farfan Garcia appeals the judgment following his conviction for willful, deliberate and premeditated attempted murder (Pen. Code, §§ 664, subd. (a)/187),[1] criminal threats (§ 422), attempted criminal threats (§§ 664/422), residential burglary (§§ 459/460, subd. (a)), felony child abuse (§ 273a), and battery with serious bodily injury (§ 243, subd. (d)). The jury found that Garcia inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)), and used a knife in the attempted murder and other offenses (§ 12022, subd. (b)(1)). He was sentenced to prison for the determinate term of nine years four months, followed by an indeterminate term of life with the possibility of parole.

Garcia contends there was insufficient evidence of willful, deliberate and premeditated attempted murder, or of the child abuse offense or domestic violence

[1] All statutory references are to the Penal Code unless otherwise stated.

enhancement. He also claims the trial court erred by failing to instruct the jury that provocation insufficient to reduce attempted murder to attempted manslaughter may reduce willful, deliberate and premeditated attempted murder to attempted murder, and by instructing the jury that mere words cannot justify an assault or battery. We affirm.

FACTS AND PROCEDURAL HISTORY

Garcia and Flora Perez cohabitated from 2001 through early 2005, and had two children together. After a history of domestic violence by Garcia, they separated in March 2005. Shortly thereafter, Perez moved to a new residence with her two children fathered by Garcia and two other children. She also shared the house with Maria Della Paz Diaz and family friends. Jose Mendoza began living with Perez two weeks before the offenses were committed.

Garcia telephoned Perez from the home of his uncle and aunt at approximately 3:00 a.m. on May 14, 2005. Garcia asked Perez, who had been sleeping, whether she was with her new boyfriend. Perez said she would talk to him the next day and hung up. Garcia called back several times, stating that he was going to come over to her house. After Garcia had repeatedly called her, Perez unplugged the telephone. Immediately after the telephone calls, Garcia drove to Perez's house which was a few minutes away. Before leaving, he grabbed a knife and told his aunt that he was "going to kill that bitch right now."

When Garcia arrived at Perez's house, he kicked in a locked door to gain entry. Perez and Mendoza were sleeping. Perez and Garcia's two children, who were one and two years old, were sleeping in the same room. Perez's housemate Diaz heard Garcia enter the house and saw him in the hallway. Perez and Mendoza also heard Garcia's voice inside the house, and jumped out of bed.

Garcia came into the bedroom and went towards Perez, stating that he was going to kill her. Seeing him in the room, Garcia then turned his attack to Mendoza, stabbing him in the left arm with a knife. Garcia told Mendoza that his "life was over," and that Garcia was going to "fuck [him] up." After he had been stabbed, Mendoza picked up Garcia's two-year-old son J.L. as a shield in order to dissuade Garcia from

continuing his attack. Garcia told Mendoza to let his son go and unsuccessfully attempted to pull the child out of Mendoza's arms. Garcia then ran out of the room, repeating his threat to kill Mendoza.

A medical examination revealed that Mendoza's stab wound cut to the bone and lacerated multiple tendons in the left arm. Surgery partially repaired the damage. Police officers testified that the door jam on the door to the Perez home had been broken and the door appeared to have been kicked open.

Garcia testified on his own behalf that he telephoned Perez only once in the early morning hours of May 14 and asked her if he could come over to her house. He testified that, although Perez told him it was not a good time for a visit, he decided to go anyway to bring her flowers and ask forgiveness. Garcia testified that Diaz let him in the door. He became upset when Diaz told him Perez was with another man. Perez and Mendoza came out of the bedroom and he and Mendoza started fighting in the hallway. Garcia found a screwdriver or spatula in the closet and stabbed Mendoza to defend himself. He claimed Mendoza had a knife and injured him.

DISCUSSION

Substantial Evidence of Willful, Deliberate and Premeditated Attempted Murder

Garcia contends there was no substantial evidence to support the jury's finding that the attempted murder was deliberate and premeditated. In evaluating such a claim, we review the record in the light most favorable to the judgment, according the judgment the benefit of all reasonable inferences from the evidence. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We uphold the judgment whenever there is reasonable and credible evidence of solid value sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*Ibid.*; *People v. Perez* (1992) 2 Cal.4th 1117, 1124-1125 [substantial evidence standard applies to evidence of premeditation and deliberation as elements of offense].)

Attempted murder requires a specific intent to kill, plus a direct but ineffective step towards killing the victim. (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1112; see §§ 187, 189, 664.) An attempted murder is willful, deliberate and

premeditated if it is committed after reflecting on the act and its consequences. (*Moore,* at p. 1113; see *People v. Stitely* (2005) 35 Cal.4th 514, 543; CALCRIM No. 601.) The reflection need not be for an extended length of time because """[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .""" (*Stitely,* at p. 543; *Moore,* at p. 1113; CALCRIM No. 601.)

In this case, Garcia does not challenge the sufficiency of the evidence of his conduct. Instead, claiming that the evidence showed a rash and impulsive act, he claims the evidence was insufficient to establish that the act was preconceived and deliberate. We conclude the evidence is sufficient to support the finding that the stabbing was preconceived and deliberate, and not a rash or impulsive act. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) Based on the evidence, Garcia was disturbed that Perez had ended their relationship, and knew or suspected Perez had begun a relationship with another man who might have been with Perez on the night of the stabbing. More directly, there is evidence that Garcia told Perez he was coming to her home and told a relative that he intended to kill Perez. He then armed himself, drove to Perez's home, broke in, and went to her bedroom. The evidence virtually compels the conclusion that Garcia formed an intent to kill no later than his telephone conversations with Perez, and formed a plan to carry out his intent after consideration of the act and its consequences.

Garcia claims his statement to his aunt that he was going to "kill that bitch right now" shows a rash, impulsive, and highly emotional mental state. Assuming that it does, a significant period of time elapsed between that statement and the offense during which Garcia was able to reflect at length about what he was going to do, and replace passion with calculated design. (See *People v. Breverman* (1998) 19 Cal.4th 142, 163.)

No Instructional Error

1. *CALCRIM No. 522*

Garcia contends the trial court erred by failing to instruct the jury sua sponte that provocation inadequate to reduce deliberate and premeditated attempted murder to attempted manslaughter may be sufficient to reduce deliberate and

premeditated attempted murder to attempted murder without deliberation and premeditation. (See CALCRIM No. 522.)[2] We disagree.

The trial court has a duty to instruct on the general principles of law closely and openly connected with the evidence which are necessary for a jury's understanding of the case. (*People v. Breverman, supra,* 19 Cal.4th at pp. 154-155.) But, the trial court has no sua sponte duty to give a "pinpoint" instruction that "relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

Our Supreme Court recently held that the predecessor to CALCRIM No. 522, CALJIC No. 8.73,[3] is a "'pinpoint instruction' relating particular evidence to an element of the offense, and therefore need not be given on the court's own motion." (*People v. Rogers* (2006) 39 Cal.4th 826, 878 (*Rogers*).) Specifically, CALJIC No. 8.73 relates evidence of provocation to the legal issue of premeditation and deliberation. (*Rogers,* at pp. 878-879.) Because it is substantively identical to CALJIC No. 8.73, CALCRIM No. 522 is also a pinpoint instruction. (See *Rogers,* at pp. 878-879, citing Judicial Council of Cal., Crim. Jury Instns. (2005) Bench Notes to CALCRIM No. 522.)

Garcia attempts to limit *Rogers* by focusing on a statement that the court's conclusion is not inconsistent with *People v. Valentine* (1946) 28 Cal.2d 121, upon which CALJIC No. 8.73 is based. (*Rogers, supra,* 39 Cal.4th at p. 879.) *Rogers* stated that *Valentine* "suggested the instructions on heat-of-passion voluntary manslaughter were

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[2] CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." Garcia's modified version simply would have inserted the word "attempted" before the word "murder" whenever it appears in the instruction.

[3] CALJIC No. 8.73 provides: "When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree."

misleading because the jury might have understood them as implying that provocation that was inadequate to reduce the murder to manslaughter was irrelevant to any issue." (*Rogers*, at pp. 879-880; see *Valentine*, at pp. 137-144.)

Based on this statement, Garcia argues that *Rogers* implicitly held that CALJIC No. 8.73 is a pinpoint instruction, rather than a required instruction, only if other instructions do not mislead the jury regarding the relevance of provocation to the degree of murder. He further asserts that other instructions in this case misled the jury in that regard. Garcia misinterprets *Rogers*, and fails to demonstrate than any jury instructions in this case were misleading.

Rogers emphasized that the conviction in *Valentine* was "reversed based on a host of instructional errors," including instructions that a killing is necessarily first degree murder if the defendant had the specific intent to kill, and that the defendant bore the burden of raising a reasonable doubt as to the degree of the murder. (*Rogers, supra,* 39 Cal.4th at pp. 879-880.) *Rogers* concluded that "*Valentine* does not stand for the general proposition that the standard heat-of-passion voluntary manslaughter instructions are always misleading in a homicide case where the jury is instructed on premeditated murder and there is evidence of provocation, or that such manslaughter instructions always must be accompanied by instructions on the principle of inadequate provocation set out in CALJIC No. 8.73. In the absence of instructional errors such as were present in *Valentine*, the standard manslaughter instruction is not misleading, because the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder." (*Id.*, at p. 880.)

We also disagree with Garcia's argument that CALCRIM No. 601, unlike CALJIC No. 8.67, fails to adequately explain the relevance of heat of passion to deliberation and premeditation. Both CALCRIM No. 601 and CALJIC No. 8.67 define willful, deliberate and premeditated attempted murder in the same manner. In relevant part, CALCRIM No. 601 provides that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." CALCJIC No. 8.67 provides that intent to kill resulting from deliberation

and premeditation, "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . . ." CALCRIM No. 601 does not include the phrase "sudden heat of passion" as does CALJIC No. 8.67, but there is no substantive difference or deficiency in the phraseology used in CALCRIM No. 601.

2. *CALCRIM No. 917*

Garcia contends the trial court erred in instructing the jury with CALCRIM No. 917.[4] He argues that, by instructing the jury that words and non-threatening acts can never justify an assault or battery, the trial court prevented the jury from considering the telephone calls between Garcia and Perez in determining whether Garcia's provocation was sufficient either to reduce the crime to attempted voluntary manslaughter or to attempted murder without deliberation or premeditation. Again, we disagree.

Garcia relies on *People v. Le* (2007) 158 Cal.App.4th 516, which held that the trial court erred by instructing the jury with CALCRIM No. 917 and by permitting the prosecutor to argue to the jury that provocative words are insufficient to reduce murder to manslaughter as a matter of law. (*Id.*, at pp. 526-527.) *Le* is a murder case in which the defendant killed his wife's long-term lover after she had broken several promises to end the affair. On the day of the killing, the wife used insulting words in a confrontation with her husband regarding the affair. (*Id.*, at pp. 519-522.)

As stated by the court, the issue was not whether provocative words could justify an assault, but whether provocation arising from the affair could have caused a reasonable person to act out of passion rather than judgment. (*People v. Le, supra*, 158 Cal.App.4th at p. 526.) *Le* stated that CALCRIM No. 917 was misleading because words of abuse, insult or reproach may be sufficient to reduce murder to manslaughter. (*Id.*, at pp. 525-526.) The court also emphasized that the prosecutor exacerbated the error by

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4 The trial court instructed with CALCRIM No. 917 as follows: "Words, no matter how offensive, and acts that are not threatening, are not enough to justify an assault or battery. [¶] However, if you conclude that Jose Mendoza spoke or acted in a way that threatened [Garcia] with immediate harm, you may consider that evidence in deciding whether the defendant acted in self-defense."

incorrectly arguing to the jury that CALCRIM No. 917 prohibited the jury from considering insulting words in determining provocation. (*Id.*, at p. 526.)

Le is readily distinguishable from the instant case. Garcia did not claim at trial that Perez provoked him during his repeated telephone calls to her, and such a claim would have been inconsistent with his defense. Garcia claimed that he acted in self-defense when confronted by Mendoza and, alternatively, that he was enraged by Mendoza's relationship with Perez. In addition, there was no evidence that Perez said anything that could have provoked Garcia. Garcia testified that there was only one call which resulted in Garcia deciding to go to Perez's home with flowers, not with anger. And, Perez's testimony might have shown that Garcia was distraught, but not that Perez provoked him during their telephone conversation. Finally, the prosecutor did not misconstrue the meaning of CALCRIM No. 917 during argument, and there is nothing in the record to suggest that the jury was misled by the instruction.

Substantial Evidence Supports Child Abuse Conviction and Domestic Violence Enhancement

1. *Section 273a Conviction*

Garcia contends that there was insufficient evidence to support his conviction for felony child abuse because there is no evidence that he willfully caused or permitted a child to be placed in a situation where his or her person or health is endangered. (§ 273a, subd. (a).)[5] He argues that the evidence shows he was unaware that his son was in Perez's bedroom until Mendoza lifted the child up, and that he ceased his attack on Mendoza as soon as he saw the child in Mendoza's arms.

Section 273a protects against a wide variety of abusive situations where serious bodily injury occurs as well as where there is a probability of injury but no actual

[5] Section 273a, subdivision (a) provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

injury. It covers situations where a person willfully inflicts or causes or permits another to inflict physical pain or mental suffering on a child, and where a person willfully causes or permits a child "to be placed in a situation where his or her person or health is endangered." (§ 273a, subd. (a); *People v. Valdez* (2002) 27 Cal.4th 778, 784-785; *People v. Sargent* (1999) 19 Cal.4th 1206, 1215-1216.)

The degree of culpability necessary for violation of section 273a is criminal negligence, not malice or a specific intent to harm. (*People v. Valdez, supra,* 27 Cal.4th at p. 781.) Criminal negligence is aggravated, gross, or reckless conduct that is such a departure from the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life. (*Id.,* at p. 783; see also *People v. Peabody* (1975) 46 Cal.App.3d 43, 48-49.)

Here, substantial evidence supports the finding that Garcia willfully caused or permitted his son J.L. to be placed in a highly dangerous situation under circumstances likely to have resulted in great bodily harm. Garcia burst into a bedroom where two-year-old J.L. was sleeping and stabbed Mendoza. Evidence supports the finding that Garcia saw the child when he first entered the bedroom before he threatened Mendoza or stabbed him with a knife. The presence of J.L. was made obvious to Garcia when the child started crying and stood up. In addition, Garcia did not immediately leave the room when the wounded Mendoza picked J.L. up. Garcia continued to struggle with Mendoza and tried to pull J.L. away while still armed with a knife. J.L was covered in Mendoza's blood following the attack.

2. *Section 12022.7, Subdivision (e) Enhancement*

Garcia also claims there was insufficient evidence to support the four-year enhancement to his sentence for infliction of great bodily harm "under circumstances involving domestic violence" in the commission of a felony. (§ 12022.7, subd. (e).)[6] He

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6 Section 12022.7, subdivision (e) provides: "Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision, 'domestic violence' has the meaning provided in subdivision (b) of Section 13700."

argues that Mendoza was not the victim of domestic violence within the meaning of section 12022.7, subdivision (e) because Perez, not Mendoza, was Garcia's former domestic partner.

As the court concluded in *People v. Troung* (2001) 90 Cal.App.4th 887, 899, section 12022.7, subdivision (e) covers great bodily injury to any person involved in an incident which occurs "under circumstances involving domestic violence" even if the injuries were inflicted upon a person who is not identified in section 13700 as a domestic partner. The enhancement does not require that great bodily injury be sustained by either the perpetrator or the victim of domestic violence or by a person in a domestic relationship. (*Id.*, at pp. 899-900.)

Garcia concedes that *Truong* is directly on point, but argues that it was incorrectly decided. He asserts that extending the scope of the enhancement beyond domestic violence by and against domestic partners renders the statute unconstitutionally vague. Although Garcia does not brief the issues involved in a constitutional challenge, *Truong* considered the question, and we agree with its analysis and conclusion that the statute is constitutional.

Briefly stated, *Truong* reasoned that a statute must be sufficiently certain so that a reasonable person of ordinary intelligence can discern what is prohibited and what may be done without violating its provisions. (*People v. Troung, supra,* 90 Cal.App.4th at p. 898.) A statute will be deemed constitutional if any reasonable and practical construction can be given to its language. (*Ibid.*) By its plain language, section 12022.7, subdivision (e) "establishes an enhancement for any person who inflicts great bodily injury upon a person in the course of an incident of domestic violence. No person of ordinary intelligence would be left guessing as to the meaning of this language. Rather, the statute clearly informs a defendant who commits domestic violence that infliction of

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As relevant to this case, section 13700, subdivision (b) provides: "'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. . . ."

great bodily injury on any person involved in the incident, whether or not a victim of domestic violence under the definition of section 13700, will result in an enhanced sentence." (*Id.*, at p. 900.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

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